Khirul Ihsan bin Hussain v Public Prosecutor

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 42–2 OF 1999
KN SEGARA J
19 JUNE 1999

Criminal Law *— Dangerous Drugs — Possession of heroin — Accused found guilty — Punishable section depends on amount (weight) of subject matter of charge — Subject matter of charge more than 5 gm — Punishable section therefore is s 39A(2) — Whether court or Public Prosecutor has discretion to invoke s 39A(1) if the subject matter of charge is not within prescribed amount under s 39A(1) — Dangerous Drugs Act 1952 s 12(2)*

The appellant was charged under s 12(2) of the Dangerous Drugs Act 1952 ('the Act') for having in his possession 5.95 gm of heroin. He was found guilty and sentenced to four years imprisonment from the date of arrest and ordered to be given three strokes of the rotan under s 39A(1) of the Act. He appealed against the sentence.

Held, dismissing the appeal and enhancing the sentence:

When a person is charged for an offence under s 12(2) of the Act relating to certain dangerous drugs of the prescribed amount referred to in s 39A, the punishable section under the Act which shall be invoked if he is found guilty of the offence and convicted is determined by the amount (weight) of the subject matter of the charge. Thus, if the subject matter of the charge is heroin and its weight is 5 gm or more, the punishable section is s 39A(2) of the Act.

In this appeal, the subject matter of the charge was 5.95 gm of heroin. Therefore, any sentence passed under the provisions of s 39A(1) of the Act would be patently wrong and unlawful. A valid sentence shall only be one meted out under the provisions of s 39A(2) of the Act. Therefore, the minimum sentence under s 39A(2) — ie a term of five years imprisonment and 10 strokes of the rotan — is imposed in substitution (see pp 400D–F, 401A–B).

[Bahasa Malaysia summary

Perayu telah dituduh di bawah s 12(2) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mempunyai dalam milikannya 5.95 gm heroin. Dia telah didapati bersalah dan dihukum empat tahun penjara dari tarikh penahanan dan telah diarah untuk dikenakan tiga sebatan rotan di bawah s 39A(1) Akta tersebut. Beliau telah merayu terhadap hukuman tersebut.

Diputuskan, menolak rayuan dan hukuman lebih berat dikenakan:

Apabila seseorang dituduh untuk suatu kesalahan di bawah s 12(2) Akta tersebut berkenaan dengan dadah berbahaya yang tertentu di dalam jumlah yang diperuntukan di dalam s 39A, seksyen hukuman di bawah Akta yang akan digunakan jika dia didapati bersalah adalah

ditentukan oleh jumlah (berat) subjek perkara tuduhan tersebut. Oleh itu, jika subjek perkara tuduhan adalah heroin dan beratnya adalah 5 gm atau lebih, seksyen hukuman adalah s 39A(2) Akta tersebut. A

Di dalam rayuan ini, subjek perkara pertuduhan adalah 5.95 gm heroin. Oleh itu, apa-apa hukuman yang diluluskan di bawah peruntukan-peruntukan s 39A(1) Akta tersebut adalah salah dan menyalahi undang-undang. Suatu hukuman yang sah akan hanya dikenakan di bawah peruntukan-peruntukan s 39A(2) Akta tersebut. Oleh itu, hukuman minima di bawah s 39A(2) — iaitu suatu tempoh penjara lima tahun dan 10 sebatan rotan — dikenakan sebagai gantian (lihat ms 400D–F, 401A–B). B

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Notes

For cases on s 12 of the Dangerous Drugs Act, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 39–41.

D

Legislation referred to

Criminal Procedure Code s 316
Dangerous Drugs Act 1952 ss 12(2), 39A, (1), (2), 39B(1)(a)

Tay Chai Huat (*Tay Chai Huat & Co*) for the appellant.
Ahmad Zaidi bin Ibrahim (Deputy Public Prosecutor) for the respondent. E

KN Segara J: The appellant was produced before the Magistrate at Gurun on 2 August 1998 charged with the offence of trafficking in 30 gm of heroin, that is, for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The case was fixed for mention by the magistrate on 4 October 1998 pending the requisition from the Public Prosecutor to have the case tried in the High Court. However, on 4 October 1998, the learned magistrate transferred the case to the Sessions Court, Sg Petani, upon the prosecution tendering an amended charge under s 12(2) of the Act for possession of 5.95gm of heroin and punishable under s 39A(2) of the Act. F

On 5 October 1998, the appellant appeared before the Sessions Court Judge, Sg Petani and claimed trial to the amended charge punishable under s 39A(2) of the Act. The charge was fixed for hearing before the sessions court judge on 6 January 1999. G

On 6 January 1999, the appellant was represented by counsel and the learned DPP appeared for the prosecution. The learned DPP then tendered a purportedly (further) 'amended' charge. H

The amended charge to which the appellant claimed trial on 5 October 1998 when he was first produced before the sessions court judge reads as follows:

> Bahawa kamu pada 26 Julai 1998, jam lebih kurang 2300 hrs, di pinggir Kampung Jeniang, Gurun, di Daerah Kuala Muda, di dalam Negeri Kedah, telah didapati memiliki dadah merbahaya iaitu *heroin seberat 5.95 gm.* Oleh itu, kamu telah melakukan *kesalahan di bawah s 12(2)* Akta Dadah Berbahaya 1952 (Pindaan 1983) dan *boleh dihukum di bawah s 39(A) (2)* Akta yang sama. I

A The purportedly 'amended' charge tendered by the learned DPP on 6 January 1999, at the date the trial was scheduled to commence before the sessions court judge reads:

> Bahawa kamu pada 26 Julai 1998, jam lebih kurang 11.00 malam, di pinggir Kampung Jeniang, Gurun, di Daerah Kuala Muda, di dalam Negeri Kedah,
B telah didapati memiliki dadah merbahaya iaitu *heroin seberat 5.95 gm* tanpa kebenaran yang sah oleh itu kamu telah melakukan *kesalahan di bawah s 12(2)* Akta Dadah Berbahaya 1952 (Pindaan 1983) dan *boleh dihukum di bawah s 39(A)(1)(a)* Akta yang sama. (Emphasis added.)

The appellant pleaded guilty to the purportedly 'amended' charge tendered on 6 January 1999. He understood the nature and consequence of his plea.
C Upon admitting the facts adduced and the exhibits tendered, the appellant was found guilty as charged and convicted. He was sentenced to four years imprisonment from the date of arrest and ordered to be given three strokes of the rotan under s 39A(1) of the Act. The appellant appealed against the sentence.

D Briefly, the facts to which the accused admitted and upon which he was convicted for an offence under s 12(2) of the Act were as follows:

> Pada 26 Julai 1998, sepasukan polis yang diketuai oleh Sjn Mejar Ahmad Bashah bin Abd Halim (pengadu) telah membuat satu intipan (ambush) di pinggir Kampung Jeniang, Gurun, Kedah (tempat kejadian).
>
> E Jam lebih kurang 11.00 malam tarikh yang sama, OKT telah dilihat melalui tempat ambush tersebut dengan berjalan kaki. Apabila pengadu memperkenalkan diri sebagai polis, OKT telah melarikan diri. OKT telah dikejar dan dilihat membuang sebuah beg 'pouch' ke tanah. OKT berjaya ditangkap dan beg yang dibuang dirampas.
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> Hasil siasatan ke atas beg 'pouch' tersebut, pengadu mendapati ia berisi
F antara lain, sebanyak enam peket plastik yang mengandungi bahan yang disyaki heroin.
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> Barang kes disahkan sebagai heroin seperti mana yang disenaraikan di dalam jadual pertama Akta Dadah Merbahaya 1952 seberat 5.95 gm.

At the hearing of the appeal against sentence before me, the appellant was
G represented by the same counsel who represented him in the sessions court. The learned DPP who appeared for the respondent was also the same learned DPP who appeared in the sessions court. I brought to the attention of the learned defence counsel and the learned DPP that although the appellant was charged for an offence under s 12(2) of the Act, the subject matter of offence was *heroin* weighing *5.95 gm* and, therefore, required the
H lawful punishable section provided under the Act to be invoked for purposes of sentencing.

The Act has introduced under s 39A two distinct subsections which provides for mandatory increased penalty in respect of an offence against the Act where the subject matter of the offence is the prescribed amount of
I certain dangerous drugs. Section 39A(1) provides:

> Every person found guilty of an offence against this Act where the subject matter of the offence is —

(a) *2 grammes* or more but less than *5 grammes* in weight of heroin; A

...

shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be *punished with imprisonment for a term which shall not be less than two years* but shall not exceed five years, and *he shall also be punished with whipping of not less than three strokes* but not more than nine strokes. B

Section 39A(2) provides:

Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is —

(a) *5 grammes* or more in weight of heroin; C

...

shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, *be punished with imprisonment for life or for a term which shall not be less than five years*, and he shall *also be punished with whipping of not less than ten strokes*. (Emphasis added.) D

Now, when a person is charged for an offence under s 12(2) of the Act relating to certain dangerous drugs of the prescribed amount referred to in s 39A, then the punishable section under the Act which shall be invoked if he is found guilty of the offence and convicted *is determined by the amount (weight) of the subject matter of the charge*. For example, if the subject matter of the charge is heroin and its *weight* is *2 gm or more but less than 5 gm*, then E the punishable section would be s 39A(1) of the Act. However, if its weight is *5 gm or more*, then the punishable section is s 39A(2) of the Act.

In this appeal before me, the subject matter of the charge was *5.95 gm of heroin*. Therefore, any sentence passed under the provisions of s 39A(1) of the Act would be patently wrong and unlawful. A valid sentence, in the F circumstances, shall only be one meted out under the provisions of s 39A(2) of the Act. Neither the court nor the Public Prosecutor has any discretion to invoke s 39A(1) *if the subject matter of the charge is not within the prescribed amount under s 39A(1)* of the Act.

The learned sessions court judge sentenced the appellant to four years imprisonment and three strokes of the rotan under s 39A(1) of the Act. The G sentence under s 39A(1) of the Act is wrong in law because the subject matter of the charge is 5.95 gm of heroin. The appellant should be sentenced under s 39A(2) of the Act. The learned defence counsel pleaded for the minimum sentence under the law to be passed on the appellant as the appellant had admitted to the charge. H

The minimum sentence under s 39A(2) is a term of five years imprisonment and 10 strokes of the rotan. This would mean enhancing the sentence imposed on the appellant by the learned sessions court judge.

Section 316 of the Criminal Procedure Code provides:

At the hearing of the appeal the judge may, if he considers there is no sufficient I ground for interfering, dismiss the appeal, or may —

...

A (b) ...in an appeal as to sentence ..., or with or without altering the finding reduce or *enhance* the sentence ... . (Emphasis added.)

In the above circumstances, the sentence imposed by the learned sessions court judge under s 39A(1) is set aside. The minimum mandatory sentence prescribed under s 39A(2) is imposed in substitution. The appellant is B therefore sentenced to five years imprisonment from the date of arrest and ordered to be given 10 strokes of the rotan.

Appeal dismissed and sentenced enhanced.

Appeal dismissed and sentenced enhanced.

C Reported by Loo Lai Mee

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